IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

FRIDAY, THE 22ND JUNE 2007 / 1ST ASHADHA 1929

CRL.A.No. 551 of 2007()

AGAINST S.C. NO. 274 OF 2001 OF THE ADDL.SESSIONS COURT, ADHOC-II, KALPETTA

APPELLANT: RESPONDENT

P.BALAN, C.NO.3859
CENTRAL JAIL
KANNUR

BY ADV. SRI. V. MANOJ KUMAR (STATE BRIEF)

RESPONDENTS: PETITIONER

STATE OF KERALA
EXCISE RANGE INSPECTOR
CR.NO.8/2000

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V.RAMKUMAR, J.

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Crl.Appeal No. 551 OF 2007

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Dated: 22-06-2007

JUDGMENT

The appellant who was the sole accused in S.C. 274 of 2001 on the file of the Addl. Sessions Court (Adhoc-II), Kalpetta, challenges the conviction entered and the sentence passed by the court below for an offence punishable under Sec. 8 (2) of the Abkari Act.

2. The case of the prosecution is that at about 5.30 p.m. on 27-6-2000 at the junction of the road running from Padinjarethara of Mannur at the 13th mile the accused was found in possession of 2.400 litres of illicit arrack in 24 packets each of 100 ml. and since the above possession was in contravention of the prohibition under the Abkari Act, the accused has committed an offence punishable under Section 8(2) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned offences, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined five witnesses as P.Ws 1 to 5 and got marked 8 documents as Exts.P1 to P8 and three material objects as MOs 1 to 3.

4. After the close of the prosecution evidence, the accused was questioned under Section 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the court below did not consider this case to be a fit one for recording an order of acquittal under Sec. 232 Cr.P.C., the accused was called upon to enter on his defence and to adduce any evidence which he might have in support there of. He did not adduce any defence evidence.

6. The learned Addl.Sessions Judge, after trial, as per judgment dated 26-08-2006 found the appellant guilty of the offence punishable under Sec. 8(2) of the Abkari Act and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1,00,000/- and on default to pay the fine to suffer rigorous imprisonment for six months. It is the said judgment which is assailed in this Appeal.

7. I heard Adv. Sri. P.Manoj, the learned counsel appearing for the appellant on State Brief and the learned Public Prosecutor Sri. K.S. Sivakumar who defended the State.

8. The only point which arises for consideration in this

Appeal as to whether the conviction entered and the sentence imposed on the appellant are sustainable or not ?

THE POINT:

9. P.W. 1 was the Excise Inspector, Kalpeta Range who detected the offence. P.W.2 was the Excise Preventive Officer who accompanied P.W.1. P.W.3 was the Excise Inspector, who conducted the investigation and laid the charge. P.Ws 4 and 5 are independent witnesses who were attestors to Ext.P3 mahazar prepared by the detecting officer. Both of them turned hostile to the prosecution.

10. The learned counsel who defended the appellant made the following submissions before me in support of his fervent plea for acquittal of the accused:-

P.Ws 4 and 5 who are the independent witnesses to the alleged search and seizure turned hostile to the prosecution. P.W.2 has admitted that the labels which were affixed on the remaining packets in MO1 series are at present absent. If so, it cannot be said that the 22 packets which are now before court in MO1 series were among the 24 packets allegedly seized from the appellant. Without testing the contents of all the 24 packets, the prosecution is not entitled to canvass for a conviction. The

punishment imposed on the appellant is very harsh.

11. I am afraid that I cannot agree with the above submissions. It is true that P.Ws 4 and 5 who are the independent witnesses to the search, seizure and arrest turned disloyal to the prosecution. But the courts are not unfamiliar with such witnesses who turn out to be cunning performers in the witness box. Where the evidence of the official witnesses is free from blemishes, it is permissible to accept their testimony notwithstanding the unfriendliness shown by independent mahazar witnesses. **(Vide Sivaraman v. State of Kerala - 1981 KLT SN.9).**

12. The credible evidence of PWs 1 and 2 shows that while they were on patrol duty at the road junction on the way from Padinjarethara to Mannur they stumbled upon the accused who was carrying a big shopper. Finding the accused fidgety, the excise party approached him. A search of his big shopper resulted in the recovery of 24 packets each containing 100 ml. of some liquid. The excise party opened two packets and found the contents to be illicit arrack. This conclusion was reached by employing the olfactory and gustatory senses of those experienced officers. The contents of the packets were

transferred to a clean bottle having a capacity of 375 ml. It was taken as 180 ml. of sample. After packing and sealing the sample bottle it was seized along with the remaining 22 packets and the big shopper under Ext.P3 mahazar. The accused was arrested. He along with the seizure documents and properties were produced before the Magistrate on 28-6-2000 as evidenced by Ext.P5 property list. The sealed sample bottle was also produced before the Magistrate with the seal intact. The endorsement by the Magistrate on Ext.P5 property list shows that the remaining 22 packets and the big shopper were entrusted with the Excise Inspector, Kalpetta for safe custody until further orders. They were subsequently got back from the excise office on the eve of the trial. That explains the absence of labels on the packets.

13. On 28-6-2000 itself, P.W.3 who had investigated the case, submitted the forwarding note before the Magistrate requesting the dispatch of the sample bottle to the chemical examiner for analysis. Ext.P7 certificate of chemical analysis shows that sample bottle along with the covering letter of the Magistrate was received in the laboratory on 30-6-2000 with the seal intact. The sample, on analysis, was found to contain 34.52 percent by volume Ethyl Alcohol.

14. Thus, the prosecution had clearly established the guilt of the appellant beyond reasonable doubt. It was not necessary to send all the 24 packets for analysis. With effect from 3-6-1997, possession, sale, transport, transit etc. of arrack has been totally banned in the State of Kerala. Whether it is 1 ml. or 2400 ml. any person keeping possession of arrack is liable to be punished under Sec. 8(2) of the Abkari Act. The two packets containing 180 ml. taken as sample from the possessions of the accused has been found to be arrack. That is sufficient to justify the conviction.

`14. The sentence imposed on the appellant also cannot be said to be excessive or disproportionately harsh. This killer brew has ruined several families. Penal servitude by way of incarceration alone can serve as an effective disincentive to such offenders. I am not inclined to interfere with the sentence imposed on the appellant as well.

In the result, this Appeal is dismissed.

V. RAMKUMAR, JUDGE

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V.RAMKUMAR, J.

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JUDGMENT